

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



To be argued by

MURRAY CUTLER

B<sup>700</sup>  
P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDUARDO MONTIELL,

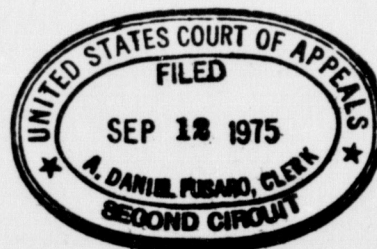
Defendant-Appellant.  
-----x

Appeal from the Judgment of the United States  
District Court for the Eastern District of New York

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BRIEF FOR THE DEFENDANT-APPELLANT  
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UNITED STATES COURT OF APPEAL  
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Docket No. 75-1274

EDUARDO MONTIELL,

Defendant-Appellant.

-----x

BRIEF FOR DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

Whether it was permissible under the rule of Chimel v. California to search and seize items from defendant's apartment after he was arrested at the entrance to the apartment.

Whether it was plain error to instruct the jury that defendant was charged with conspiracy to possess cocaine with intent to distribute, when in fact the indictment charged conspiracy to distribute, and to fail to define all elements of the crimes charged.

### STATEMENT OF THE CASE

This is an appeal from a judgment entered in the United States District Court for the Eastern District of New York (John R. Bartels, J.), on July 11, 1975.

Eduardo Montiehl was convicted by a jury of two counts of violating 21 U.S.C. § 841(a)(1), possession of cocaine with intent to distribute, and conspiracy to distribute. He was sentenced to five years' imprisonment and a special parole term of five years on each count, to run concurrently.

#### 1. The Indictment

In an indictment filed on January 30, 1975, the Grand Jury accused Montiehl of one count of violation of 21 U.S.C. § 841(a)(1) in that on September 20, 1974, he possessed with intent to distribute approximately 14 ounces of cocaine, and one count of violation of the same provision in that from September 19 to September 20 he conspired with one Alvaro to distribute quantities of cocaine.

#### 2. The Motion To Suppress

A pre-trial motion to suppress items seized from Montiehl's apartment was heard by Judge Bartels

on May 6, 1975. The evidence showed that Angelo Carrion, a Suffolk County police officer working as a narcotics undercover agent, got a telephone call from Montiell at 11:30 A.M. on September 20, 1974, and made arrangements to buy a pound of cocaine from Montiell for between \$13- and \$14,000. (3, 4, 5, 7, 9\*)

Arriving at Montiell's apartment at 4153 68th Street at 3:45 P.M., Carrion was admitted by Montiell and saw another man in the apartment, introduced as "Alvaro." (8, 10) Carrion asked where the package was, and Montiell pointed to a kitchen table. (10) The three walked over to the table, which had an empty ashtray and a white saucer. (10) Carrion took a brown manila envelope from the saucer and removed a clear plastic bag containing white crystalline powder. (11) He sniffed the powder and asked Montiell for a scale, which the latter produced, along with tin foil also requested. (11) The two melted a small quantity of the powder; this was a "street" test to see if the substance had been diluted. (12) The powder smelled like cocaine, and a white film left on the foil showed it was good cocaine, that had been cut too much. (12-13)

The package weighed 14 ounces. (13) After some discussion over the weight and price between the three, a figure of \$13,000 for a sale was

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\*Numbers in parentheses are pages in Defendant-Appellant's Appendix.

impliedly agreed upon. (13-14)

Carrion left the apartment, 5 to 10 minutes after he had entered it, ostensibly to get the money. (14, 42) He went to his car and picked up Agent Heyward. (14) The two officers knocked on the door to the apartment and were joined by Detectives Gunyan and Manthe. (15) There were 10 agents altogether participating in the "raid." (118-19) There was no response to the knocking; a sound like a toilet flushing could be heard. (15) Continued knocking and a statement that they were "Federal Agents, open up," and attempts to kick the door down produced no results. (16-17) After a while, Montiell opened the door and admitted them. (18)

As the door was opening, right after the four or five agents went through the door, Montiell was arrested, and handcuffed. (70, 114, 106-07) There was a search by Heyward and others for Alvero. (37) In a few minutes it was determined Alvero was gone. (116) Carrion retrieved the tin foil. (37) Montiell's wife came home meanwhile and was very upset and walked around the apartment; she was an asthmatic and the agents tried to calm her. (47, 50-51)

Heyward looked for weapons and other drugs "that had been destroyed." (47) He went into the bathroom and noticed white powder on the toilet bowl, on the edge, just above the water. (47, 48) Manthe scraped this powder with a matchbook cover. (47)

The court denied the motion orally. Judge Bartels reasoned that the search was not "instant to the arrest" but "was on its own because they had reason to believe that heroin [sic] was in the apartment." (123) The court further reasoned that had Montiehl left the apartment, the agents could have "come in on that" without a search warrant, but then said that that example might be open to question because "he had plenty of time to get a warrant." (125) Judge Bartels agreed with the defense that if there were time to get a warrant, there would have been probable cause to obtain one. (125) Finally, the court said that although the agents cannot enter every time they suspect the evidence will be put down the toilet bowl, if they are standing outside knocking on the door and they hear flushing, there is a different context. (128)

### 3. The Trial

After the jurors were selected on May 6, the trial was conducted on May 7 and 8, when a guilty verdict was returned. The evidence was similar to that introduced at the suppression hearing, and no issue is raised by appellant as to the sufficiency of that evidence to go to the jury.

## ARGUMENT

### POINT I--THE SEARCH AND SEIZURE OF POWDER AND TINFOIL FROM MONTIELL'S HOME AFTER HE WAS ARRESTED AT THE ENTRANCE TO HIS APARTMENT WAS ILLEGAL

Six years ago the United States Supreme Court announced the basic principle that a search without a warrant, incidental to a lawful arrest, can extend only to the defendant's person "and the area within which he might [obtain] . . . either a weapon or something that could have been used as evidence against him." Chimel v. California, 395 U.S. 752, 768 (1969). The court below therefore erred in upholding a search and seizure of powder from inside a toilet bowl in a bathroom in Montiehl's apartment, and a seizure of tinfoil from the apartment, both occurring after Montiehl had been arrested at the entrance to his home. These items, introduced into evidence as proof that Montiehl's powder was cocaine, contributed to the guilty verdict in such measure that their unlawful seizure requires reversal of the conviction.

#### 1. The Powder and Tinfoil were Illegally Seized

The facts are undisputed; the evidence relied upon by the prosecutor below and Montiehl in this Court comes from the mouths of government law enforcement

witnesses. As 4 or 5 agents entered Montiel's apartment, he was immediately arrested and handcuffed. There were a total of ten agents at the scene. Why wasn't a search warrant obtained?

In utter disregard of the familiar Chimel rule, agents went to Montiel's bathroom, looked inside a toilet bowl, and scraped a powder from inside. The situation is almost identical to that in United States v. Valdes, 417 F.2d 335 (2d Cir. 1969), where this Court said that a search of drawers when the defendant was arrested in his apartment after making a sale of drugs there might well be illegal if Chimel had been decided before the search. The court and prosecutor below do not seem to have focussed on the issue of scope of the search permitted under Chimel so much as the agents' right to enter the apartment--which is not contested. Certainly the agents have a duty to prevent the destruction of evidence. But with nobody in the bathroom, a search and seizure therein becomes the classically illegal "roaming and taking" prohibited by Chimel. In any event, seizure of the powder and tinfoil--as distinguished from search and securing these items--would not have been prejudiced by the obtaining of a warrant. Yet none of the ten agents was dispatched to legitimate the seizures.

It is instructive to contrast this case with United States v. Pino, 431 F.2d 1043 (2d Cir. 1970), where the Court in a dictum opined that even under Chimel a warrant was unnecessary. In Pino there were only two agents on the case, not ten as here; the Court was afraid that one agent left alone for security would be in danger.

In Pino the arrest was at 1:00 A.M., making the obtaining of a search warrant somewhat difficult; here the arrest was shortly after 3:45 P.M.\* Even the Pino surmise--probably the extreme example of upholding a search "under" Chimel of a dwelling without a warrant--was disapproved by this Court subsequently. United States v. Mapp, 476 F.2d 67, n. 15 at 82 (2d Cir. 1973). (Pino itself was a 2 to 1 decision on the Chimel dictum.)

It is true that the agents had good reason to look for an accomplice, Alvaro, in Montiehl's apartment. Alvaro could hardly be hiding in the toilet bowl, however; and the powder therein was hardly in open view, as the agents obviously had to bend their heads to look into the bowl. What was actually going on was testified to with either commendable candor or naivete by Agent Heyward, who said that the group was looking for weapons and other drugs "that had been destroyed." This is precisely the police activity that requires a search warrant. Since there was no impediment to securing the premises, guarding the bathroom, and obtaining a warrant for both the foil (possibly in open view) and any other narcotics found to be present in the apartment, the police classically overreached here.

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\*Carrion arrived to make the buy at 3:45 P.M. (8)  
He left the apartment to go to the car after 5 to 10 minutes, and the arrest was 4 or 5 minutes later.  
( 42, 132 )

Once the accomplice was seen to have escaped, there was no suggestion of danger. Monttiell's wife was not a threat; she was an asthmatic and was being calmed by some of the agents.

As for the tinfoil, if it was in open view, of course it was not going to evaporate; seizure of any property from a dwelling requires a warrant, even if the tinfoil's location obviated the necessity of a search for it. Securing the tinfoil would not have been a police problem of major magnitude; what seems to have been insurmountable in this case was the protection of Monttiell's constitutional rights.

It is a truism that courts do not uphold searches and seizures just because it seems silly or "unnecessary" to require a warrant. This is not the first case where Supreme Court rulings, such as Chimel, required an effort on the part of law enforcement officials to make a "good case." With ten agents involved in the arrest of Monttiell--who was not said to be armed or dangerous--the expenditure of taxpayers' money should be used to insure the legality of the arrest and search and seizure, and thus a prosecution that will stand up in court. If ever a case called for judicial enforcement of constitutional requirements, the battalion of agents deployed here certainly have earned it.\*

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\*Footnote is on next page.

\*(Footnote to prior page). Without belaboring the issue, it should be pointed out that the enforcement team had probable cause to obtain a search warrant for narcotics in Montiell's apartment well before the negotiations that took place face-to-face at 3:45 P.M. At 11:30 A.M., a telephone conversation setting up a sale took place between Montiell and Carrion. In fact, the evidence at the hearing showed that there had been face-to-face negotiations between Carrion and Montiell the day before the arrest. (23-26) Certainly by 11:30 A.M. on the arrest day, the agents had probable cause to believe there would be cocaine in Montiell's apartment in the amount of one pound--and where there is some narcotics for sale there might well be other drugs.

## 2. Even Introduction of the Powder Alone Requires Reversal

Assuming arguendo that seizure of the tinfoil was legal, the illegal seizure of the powder by itself requires reversal. The evidence of the "film" left on the tinfoil cannot be said to be thunderously convincing that the powder Montiell had was, in fact, cocaine; the effect of the chemist's analysis of the powder on the jury's verdict cannot be underestimated. Thus, without introduction of the powder at the trial a conviction might have been dubious.

The other "evidence" of cocaine can be easily discounted. It all came from the mouth of Carrion, a Nassau County policeman not qualified as an expert in cocaine analysis. He did testify that he knew the so-called "street" tests which illegal buyers use in conducting transactions. Whether these buyers know what they are doing is a moot point; Carrions' knowledge of these "tests" obviously serves him in good stead as an undercover agent, mimicking illegal buyers--not as a forensic chemist. The tests themselves consisted of sniffing and burning (133-34-35-36), and obviously are not very convincing beyond a reasonable doubt that Montiell had cocaine for sale and not a worthless substitute.

In short, the analysis of the powder seized from

the bathroom was harmful to Montiell; without it, a real issue of what Montiell had in his apartment would have been raised. Moreover, the admission of that powder corroborated the agents' testimony that they heard a toilet flushing while they were trying to get into the apartment, and that Montiell had hesitated in admitting them. ( 137-38 ) This bolstered the agents' credibility. Thus, the powder was not harmless or cumulative evidence, nor its admission harmless error, even if the tinfoil is deemed properly admitted.

POINT II--ALTHOUGH THE INDICTMENT CHARGED  
CONSPIRACY TO DISTRIBUTE, THE COURT  
CHARGED CONSPIRACY TO POSSESS WITH  
INTENT TO DISTRIBUTE, AND DID NOT  
DEFINE THE CRUCIAL ELEMENT OF THE CRIMES

Count two of the indictment charged Montiell with conspiracy to distribute. Yet the Court repeatedly told the jury he was charged with conspiracy to possess with intent to distribute. Further, the court never defined "possession with intent to distribute," even though that was the first count of the indictment, or the term "distribute." Thus, what the jury actually convicted Montiell of can never be known.

1. The Charge to the Jury Varied from the Indictment

Addressing itself to the crimes Montiell was indicted for in its charge, the court first read the indictment to the jury. ( 155 ) Thereafter, no less than six times the court told the jury that the second charge was conspiracy to possess with intent to distribute--instead of conspiracy to distribute.  
" (159, 160, 161, 164, 166 [twice])

It is fundamental that a defendant may be convicted only of crimes charged in the indictment. This Court has reversed convictions when the wrong elements of the crime charged were given to the jury--even in the absence of an exception to the

charge. United States v. Clark, 475 F.2d 240 (2d Cir. 1973). As stated in United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972), such an error "is not, after all, a case of nitpicking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." In Fields the Court also reversed despite the failure to take exceptions to the charge. Again, in United States v. Massiah, 307 F.2d 62, 70-71 (2d Cir. 1962), reversed on other grounds, 377 U.S. 201 (1964), a conviction was reversed because the court charged under the wrong statute, even though no exception was taken.

In the instant case, Congress has distinguished between "distribute," which implies an active course of conduct, and "possess with intent to distribute," which invokes a passage image combined with a particular state of mind. 21 U.S.C. § 841(a)(1). Certainly the former charge requires a jury to feel that a sale was imminently in the offing with greater certitude than in the latter charge. By telling the jury six times that Montiehl was being charged with conspiracy to possess with intent to distribute, rather than conspiracy to distribute,

the court lightened the prosecutor's burden, with the result that the verdict was a finding upon a crime not charged in the indictment.

2. The Court Did Not Define Possession with Intent To Distribute

This Court has held that it is reversible error to fail to define complex or abstract elements of a crime to the jury, despite the failure to take exception to the charge. In United States v. Clark, 475 F.2d 240, 248, supra, Judge Mansfield wrote:

If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt . . . .

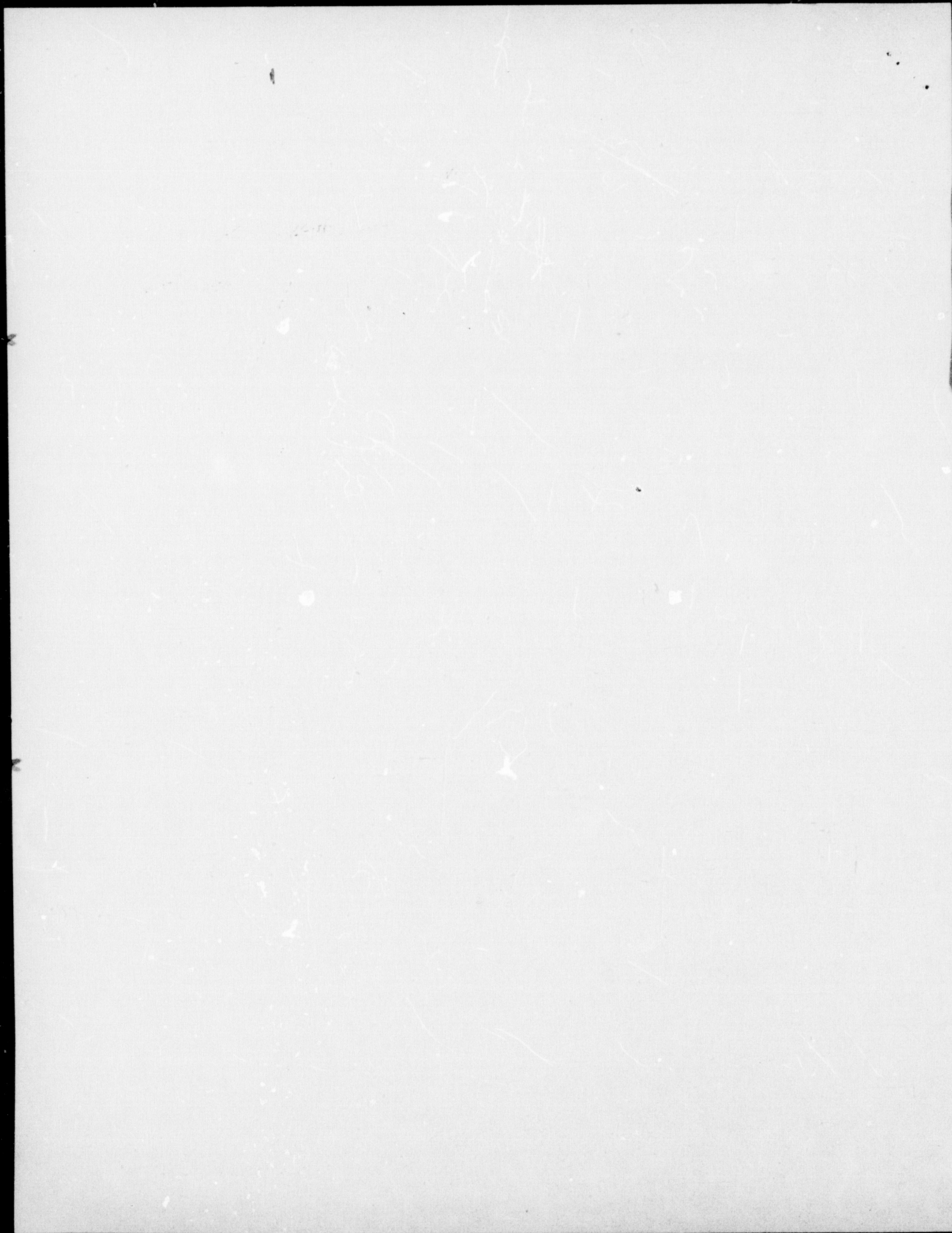
In Clark the Court reversed, inter alia, for failure to explain knowledge and intent, specifically the intent to distribute narcotics. In the instant case, not only was intent to distribute not explained to the jury, but possession with intent to distribute--a complex (to the layman) combination of act and mental state--was left entirely unilluminated. Both the substantive count, and the conspiracy count (as given to the jury by the court, but not as alleged in the indictment), depended upon an understanding of possession with intent to distribute--yet the court sent the jury

to sail that sea without chart or sextant. The court, moreover, did not define "distribute." The only discussion of "intent" was on the general nature of intent to do acts and how it can be discerned; the relationship of intent to possession, as in "possession with intent" was not explained at all, and "possession with intent to distribute" was doubly removed from the jurors' comprehension by the failure to explain "distribute."

That Montiehl may not have contested specifically at trial any of the elements the court failed to charge the jury on is, of course, irrelevant on appeal. United States v. Howard, 506 F.2d 1131, 1133-34 (2d Cir. 1974).

3. Even if Only the Conspiracy Count is Reversed,  
There Must be a Remand for Resentencing

Although Montiehl received identical concurrent sentences on the substantive and conspiracy counts, should this Court reverse only the conspiracy count the case must still be remanded for resentencing. United States v. De Marco, 488 F.2d 828, 833 (2d Cir. 1973).



CONCLUSION

IF THE POWDER AND TINFOIL ARE SUPPRESSED, THE  
INDICTMENT SHOULD BE DISMISSED;

IF THE POWDER ONLY IS SUPPRESSED, THE CONVICTIONS  
SHOULD BE REVERSED AND A NEW TRIAL ORDERED;

IF THE CONSPIRACY CONVICTION ONLY IS REVERSED,  
THE CASE SHOULD BE REMANDED FOR RESENTENCING.

Respectfully submitted,

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September 8, 1975

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